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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1027

ALABAMA ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, ALABAMA POWER COMPANY and THE SOUTHERN COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS ALABAMA POWER COMPANY AND THE SOUTHERN COMPANY IN OPPOSITION

Opinions Below

The opinion and order of the SEC are not yet reported. They are set forth at pages J.A. 113-124 of the Joint Appendix which has been filed in this Court. The opinion of the Court of Appeals is reported at 353 F. 2d 905. It is also set forth in Appendix A to the Petition herein.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

In a proceeding under the Public Utility Holding Company Act of 1935 to obtain an order of the Securities and Exchange Commission with respect to the issuance and sale of securities by an electric utility and the acquisition of such securities by its parent, a registered public utility holding company, is the SEC required, at the request of another electric corporation of the same State, to examine the use of the proceeds from such sale, already authorized after hearing by the State Commission having jurisdiction, with a view to preventing the application of any portion thereof to expenditures which such other electric corporation objected to before the State Commission, and still objects to, as duplicating some of its facilities in the same State?

Statutes Involved

The statutory provisions relied on by petitioner are Sections 1, 6 and 10 of the Public Utility Holding Company Act and Section 10(e) of the Administrative Procedure Act. They are set forth in Appendix B to the Petition.

Statement of the Case

On January 21, 1965 The Southern Company (herein "Southern"), a registered public utility holding company, and certain of its public utility subsidiary companies, including Alabama Power Company (herein "Alabama Power"), filed with the Securities and Exchange Commission (herein "SEC") a joint application-declaration seeking authorization, among other things, for the issue by Alabama Power and the purchase by Southern of 140,000 shares of common stock for $14,000,000, the pro-

ceeds to be used by Alabama Power in its 1965-1966 Construction Program. Exemption from the registration provisions of Section 6(a) of the Public Utility Holding Company Act was claimed pursuant to the third sentence of Section 6(b) thereof on the ground that the proceeds were to be used solely for the purpose of financing the business of Alabama Power and that the issue and sale had been expressly authorized by the Alabama Public Service Commission (herein "State Commission") (J.A. 1-16).

Alabama Electric Cooperative, Inc. (herein "Cooperative"), petitioner herein, sought leave to intervene in the proceeding before the SEC. It alleged that Alabama Power intended to use a portion of the proceeds of the sale of stock to construct lines and facilities that would duplicate those owned by it. The Cooperative requested the SEC to include provisions in its order authorizing the application-declaration which would prevent such a use of the proceeds, and to devise procedures whereby Alabama Power would be required to notify the SEC in advance of each future expenditure, allowing the Cooperative the opportunity to object thereto and be heard thereon (J.A. 34-44).

The same contentions had previously been made by the Cooperative in a proceeding initiated by Alabama Power before the State Commission seeking its approval of the proposed financing. The Cooperative had been permitted to intervene as an adversary party in that proceeding and had participated in evidentiary hearings before the State Commission (J.A. 107-112). Taken in a light most favorable to the Cooperative, the testimony revealed that out of total proceeds from the proposed financing amounting to

approximately $119 million, less than $2 million was proposed to be spent over a two-year period to provide electric service to the cities of Troy and Luverne, Alabama, municipal systems which had chosen to be served by Alabama Power although theretofore served by the Cooperative* (J.A. 69, 77). The Cooperative requested that the State Commission withhold its authorization of the proposed financing or, in the alternative, that it enter an order directing that no portion of the proceeds thereof or any other funds belonging to Alabama Power be used to duplicate its lines or facilities (J.A. 111).

The State Commission rejected the Cooperative's contention, finding that the proposed financing "Is for lawful objects within the corporate purposes of petitioner [Alabama Power] * * * Is compatible with the public interest [and] Is necessary, appropriate for and consistent with the proper performance by the petitioner of its service to the public * * * and will not impair its ability to perform that service * * *" (J.A. 26-7). The Cooperative has also appealed to the Alabama Courts from the foregoing order of the State Commission.

On June 1, 1965 the SEC denied the Cooperative's petition for intervention and for a hearing in the present proceeding and authorized the issue and sale of stock as proposed by Southern and Alabama Power. The SEC based its order on an express finding that the matters complained of were within the exclusive jurisdiction of the

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* Alabama Power's contracts for the supplying of electric energy to these two cities had previously been unsuccessfully challenged by the Cooperative in separate proceedings before the State Commission. The approval of these contracts by the State Commission has been upheld by the Circuit Court for Montgomery County and is currently being challenged by the Cooperative in the Alabama Supreme Court.

State Commission and that the relief requested by the Cooperative was beyond the SEC's authority under the Holding Company Act (J.A. 113-124).

The Cooperative sought review of the SEC's order in the United States Court of Appeals for the District of Columbia Circuit. Alabama Power and Southern were permitted to intervene in that proceeding in support of the position taken by the SEC. On November 24, 1965 that Court affirmed the order of the SEC, finding that the Cooperative had misconceived the purpose of the Holding Company Act and holding that the SEC "* * * acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it."*

Argument

A careful reading of the Petition herein fails to disclose any substantial ground for the issuance of a writ of certiorari in this proceeding. There is no conflict between the decision being appealed from and a decision of this or any other court. Nor is the issue raised an important question of federal law which has not been, but should be, settled by this Court within the meaning of Rule 19. Moreover, a review of the provisions and purpose of the Holding Company Act indicates that the construction of it concurred in below by both the SEC and the Court of Appeals is clearly correct.

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* *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange Commission,* 353 F.2d 905, 907 (D. C. Cir. 1965).

I.

There is no conflict of decision.

Petitioner asserts no conflict of decision between the opinion of the Court of Appeals herein and any opinion of this Court or any court. Indeed, petitioner admits that the issue has not been raised before in the entire thirty-year history of the Holding Company Act. Petitioner does contend, however, that the holdings of both the SEC and the Court of Appeals below fail to adhere to the "plain intent" of a number of decisions of this Court in which such terms as "public interest" and "public convenience and necessity" have been broadly construed in the context of various regulatory statutes (Petition, pp. 9-10).

None of these cases, however, involved construction of the Holding Company Act. Indeed, all of them involve statutes which expressly confer upon some regulatory agency certificating or licensing authority of a kind that the Holding Company Act clearly does not confer upon the SEC. Thus, *Atlantic Refining Co.* v. *Public Service Commission,* 360 U. S. 378, *FPC* v. *Transcontinental Gas Corp.,* 365 U. S. 1 and *United Gas Co.* v. *Callery Properties,* 382 U. S. 223, all involve Section 7(e) of the Natural Gas Act, 15 U.S.C. §717 f(e); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 and *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236, all arise under the Interstate Commerce Act and *National Broadcasting Co.* v. *United States,* 319 U. S. 190 and *American Airlines, Inc.* v. *North American Airlines, Inc.,* 351 U. S. 79 involve the Communications Act and the Civil Aeronautics Act, respectively.

Under all of these statutes the appropriate regulatory body has been given the duty to determine which of two or more competing services can best and most efficiently serve the public interest in the relevant area of transportation, broadcasting, et cetera. It is in this context that such agencies have been told to investigate fully all factors bearing on the public interest in reaching their determinations.

The Holding Company Act, however, does not confer upon the SEC the task of deciding which of two or more competing electric utility companies should serve a particular customer in a particular area. It creates no certificating or licensing authority in such matters at all. So the fact that the Natural Gas Act requires the FPC to consider the "end use" of gas in determining whether or not the public interest will be served by a proposed pipeline can hardly mean that the SEC must consider the "end use" of each dollar spent by the subsidiary of a regulated holding company merely because the term "public interest" appears in both statutes.

Although the question presented by the petition herein has not been raised heretofore, the identical issue involving substantially the same parties is currently awaiting argument before the Court of Appeals of the Fifth Circuit.* It is submitted that the present application for

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*The proceeding currently before the Fifth Circuit involves a second application to the SEC by Alabama Power for authority to issue and sell certain shares of preferred stock and bonds. The issue and sale of these securities was authorized by the State Commission at the same time and in the same proceeding as the common stock involved in the instant proceeding. The Cooperative again sought to intervene before the SEC on the same grounds and for the same reasons as in the instant proceeding; intervention was denied by the SEC on the basis of its opinion in the present case. Availing itself of the choice of venue afforded by §24(a) of the Holding Company Act, 15 U.S.C. §79x(a), the Cooperative has sought review of this second order in the Court of Appeals for the Fifth Circuit. Oral argument in that Circuit has been scheduled for March 28, 1966.

certiorari would be more appropriately made when and if the Fifth Circuit reaches a result in conflict with that reached by the Court below.

Petitioner anxiously seeks to borrow significance for its application from the fact that the Court has recently granted certiorari in No. 636, *Securities and Exchange Commission* v. *New England Electric System,* 346 F. 2d 399 (1st Cir. 1965), *cert. granted,* 382 U. S. 963. Petitioner suggests that since the Court will be engaged in that case in an extensive review of the legislative history of the Holding Company Act, review of the present proceeding also might be timely and appropriate (Petition, pp. 12, 15). It should however be sufficient to observe that the question presented in the *New England* case involves the construction of Section 11(b)(1) of the Holding Company Act, which defines the circumstances under which non-integrated holding company systems will be permitted to exist. An examination of this problem can scarcely be probative of the entirely different issued raised under altogether different sections of the Holding Company Act by the present petition, and petitioner's contention amounts merely to the assertion that since the Court has already scheduled one case involving the Holding Company Act it might be appropriate to accept another. We do not understand that the Court's grant of certiorari is to be invoked so lightly.

II.

There is no important question of federal law.

As petitioner concedes at page 12 of its Petition, it is not every misreading of legislative history which this Court feels impelled to correct. Of course, we do not concede that there has been any misreading at all in this

case. But even passing this, petitioner suggests no reasons why the narrow question raised by it is of sufficient importance to warrant review.

Nor can we supply any. Since the issue has not been raised before in the entire thirty years that the Holding Company Act has been in force, it is evident that similar cases involving other litigants are not now pending in other courts awaiting the outcome of the present review. Nor is this a case where the construction placed on a statute by the Court below renders it unclear or difficult to administer, or where the Court below has reached a result at variance with that of the appropriate administrative agency.

Indeed, nothing more clearly demonstrates the narrow and largely academic nature of the issue presented than a consideration of some of its practical consequences. Even should this Court grant certiorari and, after argument, reverse the court below on the merits, upon remand the SEC would presumably be instructed only to exercise its discretionary power to determine whether or not to permit intervention by petitioner. In the event that such intervention was denied, such a denial would presumably not be reviewable except upon a clear showing of abuse.

Even should the SEC permit intervention, however, and after a hearing grant the relief requested by petitioner, it should be emphasized that such relief would necessarily be partial and incomplete. Petitioner does not even suggest that the SEC has the power to prevent Alabama Power from using its funds to provide services competitive with those of petitioner, but only that it can prevent Alabama Power from using a portion of the proceeds of the current financing to do so. It seems clear

without more that the jurisdiction of this Court should not be invoked in order to implement any such fragmentary regulation.

III.

The Decision below is clearly correct.

In addition to the fact that the decisions below are not in conflict with those of any other court and the fact that the issue involved is narrow and largely academic, it is submitted that both the SEC and the Court of Appeals were clearly correct in refusing to accept the strained reading of the statute urged by petitioner. Briefly stated, petitioner's argument is that the interpretation of terms such as "public interest" and "interest of investors or consumers" in the Holding Company Act should be equated with the construction given similar terms in such licensing or certification statutes as the Natural Gas Act or the Interstate Commerce Act. Both the SEC and the Court of Appeals found this equation to be the root fallacy of petitioner's argument. As the SEC noted in its findings, "words like 'public interest' and the interest of 'investors or consumers', though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act" (J.A. 116).

Yet both the provisions and the purposes of the Act, as revealed by its legislative history, amply demonstrate that it was not the intention of Congress to involve the SEC in such endless problems of local utility regulation as which supplier can best serve a specific customer or whether such customer should be given a choice of competing services. Indeed, the whole thrust of the Holding

Company Act was to free local regulatory agencies from the burden of the large interstate holding companies over which they had no control and which thwarted effective local regulation. In so doing, Congress did not establish the SEC as the guarantor of the effectiveness of such local regulation. Nor did Congress provide for appeal to the SEC by a utility disappointed, as petitioner is here, by the refusal of the local regulatory agency to insulate it from competition by another utility.

The soundness of these conclusions is demonstrated not only by the careful examination by the SEC and the Court of Appeals of the Act and its legislative antecedents but also by the basic impracticality of petitioner's arguments. Thus, petitioner makes much of its contention that the goal of effective electric utility regulation throughout the country will remain unrealized until the SEC undertakes to fulfill what petitioner considers its mandate under the Holding Company Act (Petition, pp. 12-13). Petitioner does not suggest, however, how the SEC could possibly fulfill such a role when the Act admittedly gives it jurisdiction only over those relatively few operating utilities which happen to be subsidiaries of registered holding companies. Indeed, as petitioner well knows, the regulatory role it is urging upon the SEC could never be applied to it with the same force as to its competitor Alabama Power. To suggest that such haphazard and unequal regulation could be effective at all is clearly specious.

Putting aside even the obvious impracticality of attempting to regulate competition by regulating only a few of the competitors, petitioner nowhere suggests how the SEC is to equip itself for its monumental new role. If the SEC is really to oversee the effectiveness of local utility regulation in fifty states it will clearly have to acquire a vast

expertise not hitherto required of it. In addition, it will obviously have to find somewhere adequate statutory standards and criteria other than "public interest" or "the interest of investors or consumers" in order to measure the effectiveness of local regulation. Petitioner does not even advert to these problems, much less suggest how they might be resolved.

The conclusion is irresistible that petitioner's only concern is that it be insulated insofar as possible from the effects of local competition in the business of supplying electric service, and that having lost its struggle to obtain such insulation before the local regulatory commission properly having jurisdiction over such matters, it is now attempting on the basis of a strained construction of a wholly inappropriate federal statute to have a second day in court. It is perhaps sufficient to note that this Court has consistently refused to infer a congressional mandate to exclude local competition where none is clearly expressed. *Alabama Power Company* v. *Ickes,* 302 U. S. 464; *Tennessee Electric Power Co.* v. *TVA,* 306 U. S. 118.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 18, 1966.